(1)

90-1060

No. 90-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT A. HOLLIDAY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a cause of action exists under The Federal Employers' Liability Act for emotional injuries accompanied by lasting physical manifestations caused by being placed in a position of fear of imminent physical injuries by the negligence of the carrier where the employee was not involved in an accident or subject to any impact.

(2) Whether a safety rule promulgated to protect employees becomes the standard of care which must be met by a railroad and whether evidence of the violation of this rule may be found by a jury to be negligence.

(3) Whether the carrier breaches its duty to provide its employees with a safe place to work where it knowingly assigns an employee to perform work beyond his capacity.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

Petitioner is an individual who is the Appellant in an action docketed with the Third Circuit Court of Appeals at 90-1189 and has no corporate affiliation. Petitioner is a former employee of Respondent Consolidated Rail Corporation.

Respondent Consolidated Rail Corporation is the Appellee in the action docketed with The Third Circuit Court of Appeals at 90-1189.

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v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Robert A. Holliday ("Holliday"), respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on September 14, 1989.

OPINIONS BELOW

The Opinion of the United States Court of Appeals is reported at 914 F.2d 421 (3d Cir. 1990) and is reproduced in the Appendix hereto at A-2 to A-19.

The Opinion of the U.S. District Court for the Eastern District of Pennsylvania is reproduced in the Appendix at A-20 to A-26.

JURISDICTION

The decision of the Court of Appeals was filed on September 14, 1990. A Petition for Rehearing and for

Rehearing En Banc was filed on September 28. 1990. The Petition for Rehearing was denied on October 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

This action involves questions under The Federal Employers' Liability Act, 45 U.S.C. Sec. 51. The statutory provision is set forth in pertinent part in the Appendix at A-1.

I. STATEMENT OF THE CASE

This case arises out of injuries to Petitioner Robert A. Holliday ("Holliday") caused by the failure of Respondent Consolidated Rail Corporation ("Conrail") to provide Holliday with a safe work place and to follow its own safety rule. The injuries included psychological injuries and lasting physical manifestations thereof. The injuries were not caused by impact sustained in an accident but by Holliday's being placed in a position for which he was not qualified, resulting in continued fear for his own safety as well as at least one incident of fear of imminent physical impact and injury.

Holliday was employed as a brakeman by Conrail in the Fall of 1987. As a brakeman, Holliday was to assist the conductor of freight trains in the coupling and uncoupling of freight cars at industrial sidings and rail yards. Holliday was not required to know the physical characteristic of the rail line on which he was working.

In the freight rail business, a conductor is in charge of the train and is to assure that the train is operated safely and in accordance with the carriers' rules and that industrial switching is performed safely. Conrail has set up a system of testing an employee prior to that employee being qualified to serve as a conductor. Pursuant to Conrail rules, a conductor must be familiar with the physical characteristics of the rail lines on which he is

assigned to work. Prior to being qualified to serve as a conductor, the employee must be examined by a Conrail official regarding his familiarity with the physical characteristics of the rail line and the industrial switching along the line.

The system of testing is necessary given the responsibilities of a conductor. Conrail believes it is imperative to the safe operation of a train that the conductor be qualified over the area the train is serving. It is necessary for the conductor to have knowledge of the operation and location of switches and signals, the location of all crossings and interlocks, as well as the speed restrictions on the designated line.

In the rulebook which governs Conrail employees, the requirement that employees be qualified is spelled out. Conrail preaches to employees that adherence to the rules provides for "a safe and efficient operation". It is against Conrail policy to place an unqualified employee into any position. The placement of an unqualified employee creates unnecessary safety risks and increases the potential for accidents or other catastrophe.

In the Fall of 1987, Holliday was working as a brakeman in Conrail's Northern New Jersey corridor, coupling and uncoupling freight cars at the Port Reading Terminal and at industrial sites along Conrail's Port Reading Line. In October of 1987, Holliday was informed that the would be held out of work until he qualified to serve as a conductor on the Port Reading Line. In attempting to qualify Holliday as a conductor, Conrail assigned him to work on the WJPR-32 Train out of Port Reading with a pilot on two occasions. The pilot was a qualified conductor who would be able to instruct Holliday on the physical characteristics of the rail line and the industrial switching appurtenant thereto. On both occasions that Holliday worked with the pilot, the WJPR-32 operated at night. This did not allow Holliday an opportunity to become fully familiar with the physical characteristics of the line.

The industrial switching along the Port Reading Secondary Track where the WJPR-32 operated is extensive and complex. Thorough knowledge of the switching is essential to the safe operation of the train. Although Holliday rode with a pilot on two occasions on the WJRP-32, he was never examined by a Conrail official regarding his familiarity with the physical characteristics and industrial switching of the Port Reading Secondary Track. By Conrail's own rules, the examination was necessary prior to Holliday's becoming qualified. Holliday never received a qualification notation in his rulebook as required by the rulebook. Not only did Conrail fail to have an official examine Holliday which was necessary to qualify him as a conductor, but he also protested that, in fact, he was not familiar with the characteristics of the track or the industrial switching thereon.

On November 3, 1987, Holliday was ordered to serve as a conductor with no pilot on the WJPR-32 Train. Holliday informed Conrail that he was not qualified. Despite Holliday's protestations, he was forced to serve as a conductor. During the time Holliday was forced to work as an unqualified conductor, Conrail was experiencing a shortage of qualified conductors and was not willing to pay conductors for "deadheading" to the Port Reading terminal. Holliday's unfamiliarity and lack of qualification exposed him to hazards and Holliday was placed in fear of causing harm to himself and third parties.

Despite Holliday's protestations, Conrail forced Holliday to work the Line again on November 4, 5 and 9, 1987. On November 4, 1987 Holliday was "almost crushed" during a switching operation at "Bakelite", an industrial siding. Due to his unfamiliarity with the line Holliday found himself constantly throwing wrong switches. During this time period, Holliday began to experience heart palpitations, sleep disorders including nightmares of crashing a train and injuring people,

spastic colon, tenesmus, an involuntary rectal discharge, anxiety and depression. The disorders grew progressively worse with each tour as a conductor. When Holliday completed service on November 9, 1987, he could no longer tolerate the conditions and sought the advice of a physician. Holliday's physician and a psychologist determined that the physical complaints of Holliday were physical manifestations of psychological disorders brought about and caused by the fear of injuring himself and third parties, including his fellow employees for whose safety as the conductor he was responsible.

After treating with physicians for several months, Holliday attempted to return to work as a Brakeman. Upon his attempt to return to work, the spastic colon, involuntary rectal discharge and tenesmus returned. Holliday's doctors advised him to look for alternative employment. He has not worked for Conrail since March of 1988.

This action was commenced in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction in that Court was based on The Federal Employers, Liability Act. 45 U.S.C. Sec. 51. The District Court granted Conrail's Motion for Summary Judgment.

An Appeal of the Grant of Summary Judgment was taken to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. Sec. 1291. The Third Circuit Affirmed the District Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT THAT THE COVERAGE OF THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT EXTEND TO PSYCHOLOGICAL INJURIES ACCOMPANIED BY LASTING PHYSICAL MANIFESTATIONS ABSENT AN ACCIDENT OR IMPACT CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The Third Circuit's decision in this matter conflicts with the Fifth Circuit's decision in *Yawn v. Southern Railway*, 591 F.2d 312 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1980), the Seventh Circuit's decisions in *Gillman v. Burlington Northern Railroad Co.*, 878 F.2d 1020 (7th Cir. 1989) and *Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) and with the Ninth Circuit's decision in *Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309 (9th Cir. 1986).

The Third Circuit, despite finding that Holliday was on at least one occasion in fear of imminent physical danger, found that Holliday had not presented sufficient evidence to sustain a cause of action under The Federal Employers' Liability Act ("FELA"). The Seventh Circuit has ruled that a cause of action is stated under the FELA if the employee was placed in the zone of danger created by the negligence of the railroad, *Gillman*, 878 F.2d at 1023-24, and that a single incident of being placed in fear may sustain a cause of action for emotional distress. *Lancaster*, 773 F.2d at 822.

In *Lancaster*, the trial court was presented evidence of several incidents of assault which led to emotional injuries to Plaintiff. On appeal, the Defendant argued that all but one of the incidents offered into evidence occurred outside of the FELA's three year statute of limitations. 45 U.S.C. Sec. 56.

The Seventh Circuit held that the single incident falling within the three year limitations period was sufficient to sustain the jury's verdict. 773 F.2d at 822. Additionally, it is important to note that the fear instilled in the Plaintiff came subsequent to the actual threat of danger. The Plaintiff was exiting a door when he heard a thud on the doorjamb and turned to see his supervisor standing with a sledgehammer. At that point, *after* the danger had passed, Plaintiff became afraid. 773 F.2d at 811. Plaintiff's fear was not contemporaneous with the danger. In this case, Holliday realized he was in danger and was almost crushed as the incident happened.

In *Gillman*, the Seventh Circuit stated that a cause of action for negligent infliction of emotional distress may be brought under the FELA where: (1) the Plaintiff was placed in a zone of danger; (2) the Plaintiff felt contemporaneous fear for his safety; and (3) the Plaintiff shows some sign of physical injury or illness as a result of the emotional stress. 878 at 1023-24. The court, after listing the elements, found that Plaintiff's complaint failed to properly allege the elements. 878 F.2d at 1025.

In this action, the Third Circuit was presented a record containing the elements enunciated in *Gillman* as well as an incident creating an imminent fear of physical harm such as the Seventh Circuit found sufficient in *Lancaster.*

The Ninth Circuit has applied an even broader view of the recovery for emotional injuries than the Seventh Circuit. In *Taylor v. Burlington Northern Railroad Co.,* the Ninth Circuit acknowledged its prior holding in *Buell v. Atchinson, Topeka & Santa Fe Railway,* 771 F.2d 1320 (9th Cir. 1985), *revsd*, 480 U.S. 557 (1987) in stating that "railroad employees may assert claims under" the FELA for "wholly mental injury". 787 F.2d at 1313. The Ninth Circuit reiterated its conclusion in *Lewy v. Southern Pacific Transportation Co.,* 799 F.2d 128 (9th Cir. 1986).

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The Fifth Circuit in *Yawn v. Southern Railway Company*, 591 F.2d 312 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1981) recognized that an FELA action may be maintained where the injuries are the result not of an accident or traumatic impact but by simple working conditions created by the railroad. The Plaintiffs in *Yawn* were not injured by any accident or physical impact. The injuries were the result of overwork. The injuries were clearly not caused by an accident or physical impact.

The Ninth and Fifth Circuits clearly would have permitted this action to proceed to trial. Even under the more restricted application of the FELA enunciated by the Seventh Circuit, Holliday has presented evidence of all of the elements necessary to have the case submitted to the jury.

It is critical for the Court to address the split in the Court of Appeals decisions. Given the liberal jurisdiction and venue provisions of the FELA, the split could lead to forum shopping by plaintiffs. Additionally, as the interpretation of the FELA is to be based on the "federal common law", it is important for the Court to provide a single statement of the law to govern the interpretation of the FELA in the Lower Courts.

II. THIS CASE PRESENTS THE COURT WITH A COMPLETE RECORD WHICH WAS NOT AVAILABLE IN *ATCHINSON, TOPEKA & SANTA FE RAILWAY CO. V. BUELL,* 480 U.S. 557 (1987) AND ALLOWS THE COURT TO ADDRESS THE IMPORTANT FEDERAL ISSUE OF THE COMPENSABILITY OF EMOTIONAL INJURIES UNDER THE FELA LEFT UNANSWERED IN *BUELL.*

The issue raised in this Petition was previously before the Court in *Atchinson, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557 (1987). In *Buell*, the Court reviewed a Ninth Circuit opinion in which, *inter*

alia, the Ninth Circuit *sua sponte* held that the FELA authorized recovery for emotional injuries.

The Court remanded the case without deciding whether emotional injuries are recoverable under the FELA because there was an insufficient record. The Courts of Appeals have refused to decide several cases because the Plaintiff failed to introduce evidence of an element of an FELA action, alleviating the need to rule on the compensability of emotional injuries. *See, e.g., Adams v. CSX Transportation, Inc.*, 899 F.2d 536 (6th Cir. 1990). The Third Circuit's decision in this action, however, did not rely on the lack of evidence of any element of a cause of action for negligent infliction of emotional distress, but rather found the lack of accident or physical impact to be dispositive. The decision clearly conflicts with the decisions of the Fifth, Seventh and Ninth Circuits as stated in Section I above.

In the instant action, the record is sufficient to decide the questions left open by the Court in *Buell*. The record contains evidence regarding the negligence of Conrail, Petitioner's injuries and medical testimony establishing a causal relationship between the negligence and injuries.

The record establishes that Petitioner has introduced sufficient evidence to require the case to survive a Motion for Summary Judgment under this Court's decision in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957). In *Rogers*, this Court stated that the test for submission of an FELA action to the jury is simply "whether the proofs justify within reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury... for which damages are sought. 352 U.S. at 503. The record contains testimony of a causal relationship between Conrail's negligence and the injuries of Petitioner.

Holliday has introduced evidence of very real psychological and physical injuries. The term "injury" is not

defined in the FELA. This Court, in interpreting "injury", has refused to limit the harms which are compensable under the Act. *Urie v. Thompson*, 337 U.S. 163, 181-182 (1949). The Court has spoken of injury in terms of impairment or destruction of health. 337 U.S. 186.

Under such a definition there can be no question of the compensability of Petitioner's injuries. His health is no less impaired than as if he were injured being struck by a locomotive. The end result is the same—injuries which are demonstrated by the medical evidence presented in the record have damaged Petitioner.

The Third Circuit, as it was required by the record, acknowledged the psychological injuries as well as the very real, lasting physical manifestations of the injuries. Under the interpretations of the FELA given by this Court, Petitioner has suffered a compensable injury. This Court, in *Buell*, indeed acknowledged the Fifth Circuit's decision in *Yawn*. While the Court did not explicitly cite *Yawn* for the proposition that nonimpact injuries were compensable under the FELA, the Court cited the decision to underscore the liberal construction given the FELA. 480 U.S. at 564-65.

The Court's guidance on this important question is necessary as the District and Circuit Courts are giving wide ranging statements on the status of the "federal common law" which governs FELA actions. The growing majority of District Court decisions favor allowance of a cause of action for injuries similar to those stated to Holliday. As stated above, the Courts of Appeals are now divided.

III. THE DECISION OF THE THIRD CIRCUIT THAT CONRAIL'S FAILURE TO FOLLOW ITS OWN SAFETY RULE WAS SIMPLY A "MANAGEMENT DECISION" AND NOT NEGLIGENCE CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE EIGHTH AND SECOND CIRCUIT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The record below establishes that Conrail developed the rule that an employee may not work a position for which he is not qualified in order to protect its employees. Conrail repeatedly violated its own rule in regard to Holliday. The Third Circuit, in balancing the harm that befell Holliday with the negligence of Conrail, found Conrail's actions in disregarding its own safety rule to be a simple "management decision" rather than negligence.

The decision of the Third Circuit is in conflict with the decisions of the Eighth Circuit in *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982) and *Fletcher v. Union Pacific Railroad Company*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981) and the Second Circuit in *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097 (2d Cir. 1986) *cert. denied*, _____ U.S. _____, 108 S. Ct. 94, 98 L.Ed. 2d 54 (1987). In both *Bailey* and *Ybarra*, the courts held that a railroad's safety rules may be looked at to set the standard of care due an employee. The failure to follow or enforce the rule is negligence.

Conrail's rule was enacted to protect employees from harm. The deliberate decision not to enforce the rule caused injuries to Holliday. The actions of Conrail were at least negligent if not reckless.

The decisions by the Courts in *Bailey* and *Ybarra* further emphasize a carrier's duty under the FELA to promulgate and enforce safety rules. The duty to enforce the rules gives muscle to the duty to promulgate rules. The Third Circuit's position flies in the face of the

developed FELA jurisprudence in that it allows a carrier to disregard the safety of employees when it feels it is necessary for business reasons. Labeling the action a "management decision" condones the failure of Conrail to enforce its own safety rules.

Additionally, implicit in the Third Circuit's decision that assigning Holliday to a position for which he was not qualified is a rejection of the Eighth Circuit's holding in *Fletcher* that a railroad has a duty to assign employees to work for which they are reasonably suited. The duty is breached when the railroad negligently assigns an employee to perform work beyond his capacity. 621 F.2d at 909. In this action, it is clear that Holliday, by his own admission and by Conrail's own rules, was not suited or qualified to perform the duties of conductor. Nevertheless, Conrail knowingly assigned him to the position causing his injuries.

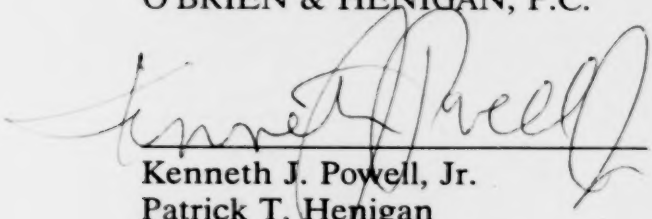
A uniform decision on this point of FELA interpretation is necessary to guide the carriers and employees the Act is designed to protect in providing safe working conditions. The view adopted by the Second and Eighth Circuits furthers the remedial purpose of the FELA.

CONCLUSION

For the reasons stated above, Robert A. Holliday respectfully urges the Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

O'BRIEN & HENIGAN, P.C.



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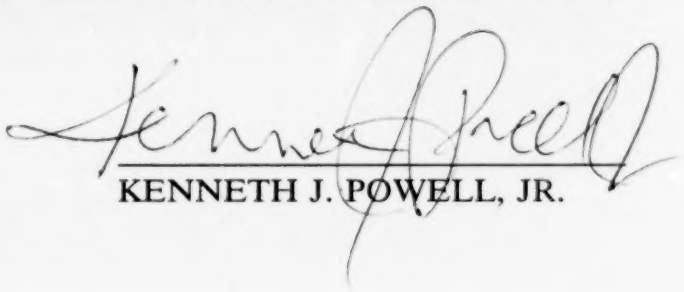
Dated: December 26, 1990

CERTIFICATION OF BAR MEMBERSHIP

I, Kenneth J. Powell, Jr., Esquire, certify that I am a member in good standing of the Supreme Court of the United States of America having been admitted on June 9, 1986.



KENNETH J. POWELL, JR.

CERTIFICATION OF SERVICE

I hereby certify that on this 26th day of December, 1990, I hand delivered three true and correct copies of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to counsel for Respondent at the following address:

Jonathon F. Altman, Esquire
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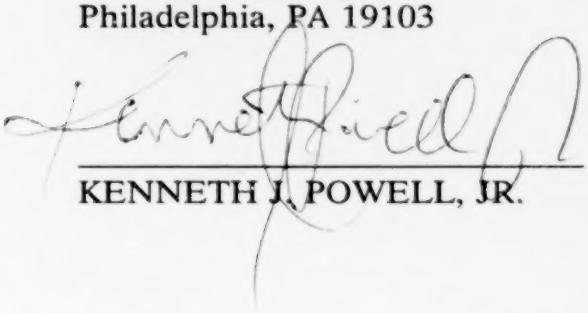

KENNETH J. POWELL, JR.

APPENDIX

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATUTORY PROVISION OF THE FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C. Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Filed September 14, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1189

ROBERT A. HOLLIDAY,

Appellant

vs.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 89-06688)

Argued August 14, 1990

BEFORE: MANSMANN, GREENBERG and SEITZ,
Circuit Judges

(Filed: September 14, 1990)

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OPINION

GREENBERG, *Circuit Judge.*

Plaintiff Robert A. Holliday appeals from an order for summary judgment entered February 28, 1990, in favor of defendant Consolidated Rail Corporation in this action under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* Our review is plenary and thus we may affirm only if there is no dispute as to any material fact and Conrail is entitled to judgment as a matter of law. *Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir. 1988).

Viewing the facts most favorably to Holliday, we accept the following for purposes of this appeal. Holliday was first employed by Conrail in 1979 as a brakeman. Within one year he was promoted to yard conductor but was furloughed in 1980. In 1986 he was recalled by Conrail and in the fall of 1987 was serving as a brakeman at the Port Reading, New Jersey, terminal and at industrial sites along the Port Reading line. At that time Holliday was informed that he would be held out of service until he qualified as a conductor on the Port Reading line. While brakemen and conductors sometimes do similar work, conductors are in charge of trains and, unlike brakemen, must be familiar with the physical characteristics of the lines on which they work.

To qualify as a conductor, Holliday worked on the Port Reading line with a pilot on October 28 and October 29, 1987. He also worked with a pilot on another line on November 6, 1987, though by then he had worked without a pilot as a conductor. Holliday, however, did not become

familiar with the track on the Port Reading line or the switching thereon. Furthermore, he was not examined by a Conrail official regarding his knowledge of the physical characteristics and switching of the tracks on the line, nor did he receive a notation in his rulebook that he was a qualified conductor.

On November 3, 4, 5 and 9, 1987, Holliday worked as a conductor on the Port Reading line without a pilot. However, this was over his objections as he did not consider himself qualified in that capacity, a conclusion he has supported in this case with expert testimony. While serving as a conductor Holliday was not involved in any accident, though he frequently threw the wrong switches and, on one occasion, was almost crushed during a switching operation.

The stress of the job adversely affected Holliday, as he started to experience heart palpitations, sleep disorder including nightmares of train wrecks and injuries, spastic colon, tenesmus, involuntary rectal discharge, anxiety and depression. His condition rapidly progressed so that when he completed service on November 9 he could no longer work and he sought the advice of a physician. There is evidence that his physical problems and psychological disorders were attributable to his fear of causing an accident and of being injured. Holliday did not work for Conrail for several months after November 9 but he then came back as a brakeman. However, he did not continue in that employment as his spastic colon, involuntary rectal discharge and tenesmus returned.

On September 20, 1989, Holliday filed this FELA action against Conrail, alleging that at "the time of the accident and the injuries [he] was employed

by [Conrail] as a brakeman" and on or about November 3, 1987, "was injured due to being forced to work on a job that he had not been 'qualified' for." Holliday asserted that the "accident was caused by the negligent and/or unlawful conduct of [Conrail]."[1] Conrail subsequently moved for summary judgment, pointing out in its supporting memorandum that Holliday made no claim of having been involved in an "accident" as he suffered "no actual physical impact . . . to produce an injury." Thus, his condition was simply attributable to the working conditions. The district court granted summary judgment by an order entered February 28, 1990, without an opinion, and this appeal followed.

On June 1, 1990, the district court filed a memorandum opinion explaining why it had granted summary judgment. It rejected Holliday's claim "that the cause of his stress was the fact that he was almost involved in some kind of accident during one of the trips that he made without a pilot," as it viewed the depositions as not supporting this conclusion. The court explained that if "it was fear of imminent impact that was the cause of [Holliday's] claimed injuries then it was [Holliday's] obligation to get that onto the record in a form that is cognizable by a court that is deciding a motion for summary judgment, merely claiming it in his brief is not enough." The court then held that the physical manifestations of the injuries were not in themselves sufficient for Conrail to be liable. Ultimately, the court concluded that:

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1. Conrail asserts that Holliday never worked in any territory in which he was not qualified. While this may be true, we accept Holliday's contrary contention on this appeal.

A fair reading of the evidence in this case taking all inferences in favor of the plaintiff and resolving all questions of credibility in his favor indicates that: 1) the plaintiff thought he was unqualified for the job he was doing; 2) he had a very responsible and important job; 3) he never did undergo a test to see if he was familiar with the physical characteristics of the railroad; 4) failure of the conductor to do his job properly could cause a serious accident; and 5) these facts made the plaintiff deeply afraid. This is insufficient to support a claim under the FELA. It was for these reasons that I entered summary judgment for the defendant.

Undoubtedly, the Federal Employers' Liability Act provides a broad basis for recovery, as it recites that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51. Yet it is evident from the Supreme Court opinion in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 107 S.Ct. 1410 (1987), that it is not clear that the FELA was intended to provide for a recovery in a situation such as that here. In *Buell* an employee brought a FELA action in district court, alleging that the railroad was liable to him because he had been harassed, threatened and intimidated on the job, causing him to suffer "a mental breakdown, and certain associated physical disorders." *Id.* at 1413. The railroad moved for and obtained summary judgment on the ground that the action involved a minor dispute subject to the procedures of the

Railway Labor Act. The Court of Appeals reversed, holding that the employee's claims were not arbitrable under that act and that the FELA action was therefore not precluded. *Buell v. Atchison, Topeka and Santa Fe Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985). Furthermore, though the issue had not been briefed, the Court of Appeals indicated that an employee's wholly mental injury stemming from railroad employment is compensable under the FELA.

The Supreme Court granted certiorari. 106 S.Ct. at 1946. It rejected the railroad's arguments that the Railway Labor Act provides the exclusive forum for any dispute arising out of working conditions and that emotional injuries should not be actionable under the FELA because of their close relationship to minor disputes under the Railway Labor Act. 107 S.Ct. at 1415. These conclusions, however, did not resolve the question of whether the term "injury" within the FELA included emotional injuries. The Court indicated that "[t]he question whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case." 107 S.Ct. at 1417. Thus, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.* In the circumstances, it declined to determine whether the employee's claim was cognizable under the FELA as the facts of the case had not been adequately developed. Accordingly, the judgment of the Court of Appeals was vacated on this point.

Unlike the Supreme Court in *Buell*, we have a record permitting us to make an exacting scrutiny

of the facts of the case and thus the matter is ripe for determination. The essence of Holliday's claim is that he was inadequately trained as a conductor and, as he was thus unqualified for that position, he suffered stress with resultant physical manifestations when he worked as a conductor. Holliday does not contend that he was in an accident with physical impact, that there was an injury to any other Conrail employee or for that matter to anyone else, or indeed that there was any accident at all. We must make the legal determination of whether in these circumstances he has established facts which could justify a finding that he suffered an "injury" within the meaning of 45 U.S.C. § 51. Our inquiry in this regard, as directed by *Buell*, particularly focuses on the "nature of [his] injury and the character of the tortious activity." 107 S.Ct. at 1417.

We have not previously passed upon a case similar to this, but the district court recently did so in *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990), an action involving emotional injuries including physical conditions attributed to job stress. There four former railroad employees brought actions against Conrail alleging that they suffered these injuries as a result of Conrail's failure to provide them with a safe workplace. However, none of the employees asserted that he had been involved in an accident resulting in direct physical injury. Rather, their allegations were that their ailments were caused by heavy workloads, chaotic working conditions, safety and operating rule violations, reductions in force, introduction of computers, loss of lunch and rest breaks, and institution of disciplinary actions. 723 F. Supp. at 1075-76. The district court, after

Lancaster, 773 F.2d at 813.[2] Indeed, plaintiffs in the case at bar were allegedly injured by performing the normal duties of their jobs as structured by management and as monitored by the union. As work rules and working conditions represent issues that are at the heart of labor-management negotiations, the court will not upset the delicate balance of the collective bargaining agreement absent a more compelling reason.

For these reasons, plaintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and, yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Id. at 1090 (footnotes omitted).

We are satisfied that whatever might be concluded in other circumstances involving claims for emotional injuries, the overall *Kraus* approach should be adopted here. In reaching this conclusion, we read the record with respect to Holliday's near accident somewhat differently than did the district court. The near accident was described by Holliday in notes he made as a sort of diary, contemporaneously with the events in 1987, as follows:

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2 *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1600 (1987).

an extensive review of federal and state opinions, granted Conrail's motion for summary judgment, holding that the conduct that has led to the evolution of the tort of negligent infliction of emotional injuries was "simply not the type of conduct alleged" in the case. *Id.* at 1089. Rather, such actions in state courts have been limited primarily to those involving plaintiffs alleging specific physical contact. Furthermore, even in federal courts "where creative lawyering has expanded the limits of intentional and negligent infliction in the FELA context" plaintiffs have usually alleged physical impact on themselves or third parties or incidents of offensive conduct directed specifically at them. *Id.* at 1089-90.

The court then indicated that:

> Recovery for negligent infliction of emotional distress in this case should be limited for the reasons so often outlined by other courts—namely, a fear of (1) incalculable and potentially unlimited damages, (2) a flood of litigation brought by disenchanted workers, and (3) fraud. These, at least, are the explicit reasons given by courts who might also sense—but cannot explicitly acknowledge—some problem with causation or foreseeability or, perhaps, some feeling that the plaintiff 'assumed the risk' of contracting stress-related illnesses by voluntarily accepting stressful positions. Generally, these articulated and unarticulated views are reactions to the application of the 'thin skull rule' to claims where the offensive element is not a physical touching of plaintiff, nor the sight of injury or illness to another, but as Judge Posner wisely wrote, 'too much—not too dangerous—work.'

> while on duty 11-4-87 WJPR 32 my mind not on what it should be. I almost got crushed while working on trk. #9 at Bakelite. Pressure was b[u]ilding up on me, at that time [.] Also I was thro[w]ing wrong switches, and I should have known better.[3]

App. at 127.

In an affidavit an expert witness explained that this event involved Holliday's being "nearly caught by close clearance." App. at 442. We think that a fair reading of the record supports a conclusion that his condition could be partially attributed to this incident, as it is reasonable to believe that his fear of accidents was based on his job experiences.

Nevertheless, we conclude that the fact that on one occasion Holliday was in physical danger is not a sufficient basis for us to permit his condition to be regarded as involving an "injury" attributable to the job. Even if a recovery could be allowed for emotional injuries without physical impact, the event described, which in itself involved no direct injury to Holliday, no physical impact and no accident at all, was not sufficiently consequential to support a recovery.[4] Railroad work requires

3. Holliday demonstrated considerable prescience in keeping these notes as he started compiling them on October 14, 1987, when he was told he would be held out of service until he qualified as a conductor. This was several weeks before he served alone as a conductor and thus was before November 3, 1987, the day that he claimed in his complaint that he was injured. He explained in a deposition that he kept them because he realized he was having a problem and he wanted to be able to look back and remember what had transpired.

4. Our decision is predicated on the nature of Holliday's injuries and the character of Conrail's activity. We nevertheless point out that there is some question as to whether Conrail could be held responsible for the

employees involved in switching or other similar operating positions to be in close proximity to equipment capable of causing them physical injury so that any employee who does not keep his mind on his work can be injured.

We also acknowledge that Holliday's condition was not solely emotional, as he suffered from physical consequences attributable to his emotional state, but that circumstance does not alter our analysis. In *Buell* the Supreme Court noted that the employee had "physical disorders," thus suggesting that the Court did not consider their presence as precluding application of the analysis made in a case without physical manifestations of emotional distress in determining what constitutes an injury under the FELA. 107 S.Ct. at 1413. The physical manifestations, though obviously germane to the assessment of Holliday's condition, have no bearing on the character of Conrail's allegedly tortious activity.

Inasmuch as Holliday worked as a conductor without a pilot for only a few days and does not contend that Conrail was negligent in allowing him to work as a brakeman, a position he enjoyed, this case involves nothing more than a situation in which the stresses of the job over a very short period were too much for him. But surely employees in all walks of life are placed in difficult,

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consequences of the close call in the crushing incident, since Holliday contemporaneously attributed that situation to his own lack of attention rather than inadequate training. Even an expert can be injured if he does not pay attention to his work. We further observe that many persons come close to being physically injured, *e.g.*, a near motor vehicle accident, without even contemplating making a claim. We do note, however, that Holliday produced an affidavit from an expert witness which indicates that Holliday told him that the incident was caused by his inexperience at the site involved.

tense job situations, sometimes for extended periods, so there was nothing unusual here. Overall, we are satisfied that while Holliday may not have been qualified as a conductor, Conrail's allegedly tortious activity in putting him in that position was simply an ordinary management decision and was not of such a character that his emotional reaction and related physical consequences constituted an "injury" compensable under the FELA. In this regard, we observe that the conductor's position was in some respects similar to his job as a brakeman. Furthermore, Holliday had some training to be a conductor, as he worked with a pilot for a few days. We also note that Holliday asserts that even the duties of a brakeman were emotionally too difficult for him, though he does not suggest he was not qualified for that position in which he contends he was "happy and content," for he indicates that:

> After treating with physicians for several months, Holliday attempted to return to work as a Brakeman. Upon his attempt to return to work, the spastic colon, involuntry [*sic*] rectal discharge and tenesmus returned. Holliday's doctors advised him to look for alternative employment. He has not worked for Conrail since March of 1988.

Appellant's Brief at 8 (references to appendix omitted). We reiterate that the allegedly tortious activity did not result in a physical injury to another party which Holliday witnessed or indeed injury to another party at all. In fact, there was no accident. We therefore conclude that summary judgment was appropriately granted.

There is precedent to support our result. In *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct.

452 (1987), decided after *Buell*, a former railroad employee sued the railroad under the FELA for emotional distress, charging that it deliberately and premeditatedly conspired to have him terminated without regard for the consequences of its actions.[5] The Court of Appeals upheld the dismissal of the action as it concluded that the FELA "has not been applied to any intentional torts lacking any physical dimension such as assault." *Id.* at 341. While we realize that Holliday has characterized his claim as involving negligence rather than intentional wrongdoing, we find *Adkins* helpful as our concern under the FELA is whether Holliday suffered an "injury" within that statute. Certainly the fact that a railroad's conduct is "intentional" rather than merely "negligent" should not necessarily excuse it from liability under the FELA, for the Supreme Court recognizes that the statute "has been construed to cover some intentional torts even though its text only mentions negligence." *Buell*, 107 S.Ct. at 1414 n.8. Thus, at bottom, a decision rejecting liability for injuries derived from emotional causes can best be explained by focusing on the character of the injury to the employee rather than the nature of the railroad's conduct. Accordingly, *Adkins* supports our result to the extent that our decision is predicated on the impact of Conrail's alleged negligence on Holliday. Of course, it is also reasonable to conclude that if the allegedly intentional conduct by the railroad in *Adkins* could not be the basis for liability, that the less culpable acts of negligence advanced by Holliday cannot be either, as under *Buell* we consider the character of Conrail's activity in determining whether Holliday may recover. *See also Gillman v.*

5. The *Adkins* court was aware of *Buell* and discussed it.

Burlington Northern R.R. Co., 878 F.2d 1020 (7th Cir. 1989);[6] *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 1170 (1989).

Results similar to that in *Adkins* were reached by district courts in *Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd*, 782 F.2d 13 (1st Cir. 1986), and *Moody v. Maine Central R.R. Co.*, 620 F. Supp. 1472 (D. Maine 1985), *aff'd*, 823 F.2d 693 (1st Cir. 1987). The precedential value of those cases is limited, however, as in each the Court of Appeals affirmed on grounds not germane to the issue here and the district court opinions were rendered prior to *Buell*. Nevertheless the opinions are some support for our result.

We emphasize that our opinion is narrow. We are not holding that there can never be a recovery under the FELA for emotional conditions unless the employee suffers an immediate physical injury from the railroad's negligent conduct, or unless there is at least an accident of some kind, as we need not and do not reach that issue. Thus, our holding does not draw a "bright line" requiring a direct impact traceable to the employer's negligence before there can be a FELA recovery. We are not called upon to decide whether an employee exposed to dangerous conditions for a

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6. *Gillman* supports our result, though the district court adopted state law in determining whether a claim for negligent infliction of emotional distress could be sustained under the FELA, an approach not challenged on appeal. 878 F.2d 1023. Judge Kanne concurred "but only on the grounds that no claim for relief for negligent infliction of emotional distress exists under FELA." 878 F.2d at 1025. We are deciding this case under federal law and thus the concurring opinion in *Gillman* is more significant to us than the majority opinion.

protracted time, though not in an accident, could recover. But we hold that the facts in this case, considering the character of the allegedly tortious activity, *i.e.*, placing Holliday for a few days in a position in some ways similar to his prior assignment but for which he was unqualified, and the lack of direct, physical impact on him, when viewed in the light most favorable to him, cannot support a recovery.

We, along with the Court of Appeals for the First Circuit, "discern from the *Buell* opinion an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open." *Moody v. Maine Central R.R. Co.*, 823 F.2d 693, 694 (1987). We are encouraged to reach our result by the realization that if we hold that a railroad employee demonstrating some possible negligence with psychological consequences will always present a jury question in a FELA action, the most attenuated claims could be advanced. Indeed, a routine management decision not resulting in an accident could give rise to a claim by an employee for psychological injuries. We think that we must determine whether there may be a recovery, as the Supreme Court indicated in *Buell*, on the basis of the facts in the particular case being considered and that is what we have done. While a bright line is always cherished by judges and attorneys, the fact is that in some situations, as Judge Becker noted in a very different context in *United States v. Balascsak*, 873 F.2d 673, 685 (3d Cir. 1989) (concurring opinion), "developing the law on a case-by-case basis and drawing lines depending on the facts is the stuff of judging . . . ." We have developed the law in this case on that basis and the line we draw will not allow recovery.

The order of February 28, 1990, will be affirmed

Mansmann, *Circuit Judge*, dissenting.

Because I would find as a matter of law that the FELA permits a recovery for emotional distress and because I believe that Holliday has alleged facts sufficient to create a genuine issue as to whether Conrail's negligence caused him to suffer injury as a result of emotional distress, I would vacate the grant of summary judgment and permit the claim to be presented to a jury.

The remedial purpose of the FELA cannot be disputed. As stated by the Supreme Court in *Atchison T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987): "We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish Congress's objectives.'" 480 U.S. at 562. Therefore, because "FELA jurisprudence gleans guidance from common law developments, . . . whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." 480 U.S. at 568.

The FELA carried forward the common law duty of requiring the railroad employer to provide a safe place for the employee to work. *See Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943) (under common law the "duty of employer to use reasonable care in furnishing his employees with a safe place to work was plain"); *Payne v. Baltimore & O.R. Co.*, 309 F.2d 546 (1962), *cert. denied*, 374 U.S. 827 (1963) (same). Thus, if an injury occurs because the railroad has failed to provide a safe workplace, the railroad has breached its duty and can be found liable for the foreseeable harm. *Ackley v Chicago & Northwestern*

Transp. Co., 820 F.2d 263, 267 (8th Cir. 1987) ("duty to provide a reasonably safe place to work, while measured by foreseeability standards, is broader under the statute than a general duty of due care"). I agree with the statement by our sister court of appeals in *Fletcher v. Union Pacific R.R.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), that the duty to provide a safe workplace includes the duty not to assign an employee to a job for which the individual is not suited or prepared. 621 F.2d at 909. Simply stated, I would hold that the plaintiff has alleged sufficient facts to hold that Conrail created an unsafe workplace here by assigning an employee to a position for which he was unqualified.

The majority compares Holliday's complaint with those of four overworked and overstressed employees in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990). In *Kraus*, the district court noted that the plaintiffs had failed to allege outrageous conduct, an element of the tort of intentional infliction of emotional distress. The district court also rejected the plaintiffs' claims premised on negligent infliction of emotional distress, concluding that the stress was the result of general working conditions to which the plaintiffs subjected themselves by virtue of voluntarily undertaking their employment.

While Holliday has not alleged facts of outrageous behavior on the part of Conrail sufficient to support a claim for the intentional infliction of emotional distress, the facts demonstrate that his complaint was more than a mere disgruntlement with general working conditions. I would hold that the facts alleged illustrate the "subtle distinctions" referred to by

the Supreme Court and distinguish Holliday's claims from those of the employees in *Kraus*. Indeed, and the majority does not dispute, Holliday alleged that he was not qualified for the position in which Conrail placed him, that he was not examined as to his qualifications and that he was required to work without the supervision of a qualified pilot on several occasions. During this time he found himself throwing the wrong switches and, at one point, he was almost crushed during a switching operation. This near miss, which the majority dismisses as being insufficient to support an injury attributable to the job, indicates to me that Holliday had been placed in the "zone of danger" created by Conrail's negligent assignment of Holliday to a position for which he was not qualified. *See Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (duty owed to those who are foreseeably harmed by the conduct in question). Moreover, Holliday's injuries were not limited to psychological distress but included substantial physical symptoms as well.

Because I believe that Holliday has alleged sufficient facts from which a rational trier of fact could conclude that his injuries were the result of Conrail's negligence in assigning him to a position for which he was not qualified, I would vacate and remand for a jury trial.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT A. HOLLIDAY	:	CIVIL ACTION
V.	:	
CONSOLIDATED RAIL CORPORATION	:	No. 89-6688

MEMORANDUM

May 31, 1990

R. F. Kelly, J.

In this FELA case summary judgment was granted in favor of defendant Conrail.

Plaintiff was hired by defendant as a freight trainman and for three years thereafter worked as a conductor and brakeman on freight trains in rail yards in and around Allentown, Pennsylvania. He was then laid off for five years and during this time did not work for a railroad. In 1986, plaintiff was recalled to service as a freight trainman assigned to Conrail's New Jersey Division, working primarily in Northern New Jersey. For a year the plaintiff worked on freight trains in New Jersey as a brakeman. In October 1987 the plaintiff was told that he was being held out of service in order for him to qualify as a conductor. Conductors and brakemen are both trainmen and perform the duties of coupling and uncoupling cars, operating switches, watching for signals and observing conditions at road crossings. The conductor is also in overall charge of the train and is responsible for the satisfactory completion of the assigned tasks of the crew. The actual driving of the train is done by the locomotive engineer. Service as a conductor requires that the employee have been promoted to that status after satisfactory performance as a brakeman and that he be familiar with the "physical characteristics of the railroad," that is, the actual physical location of the tracks, signals, switches, sidings and operating rules

applicable to the portion of the railroad over which the train will operate.

Because of the plaintiff's past experience, the only requirement for his qualification as a conductor was for him to demonstrate to a rules examiner or road foreman that he was familiar with the physical characteristics of the railroad.

Plaintiff was then assigned to work as a conductor on a freight train under the supervision of a "pilot." A pilot is a qualified employee who would be in charge of the job and who could make sure that plaintiff was properly performing the duties of a conductor and was becoming familiar with the physical characteristics of the railroad. The train that the plaintiff was assigned to was designated WJPR-32.

Plaintiff worked on this train twice with a pilot at night, which plaintiff stated prevented him from becoming familiar with the physical characteristics of the railroad.

On November 3, 1987 plaintiff was assigned to work the train without a pilot. He complained that he was not qualified. He was assigned to work the train twice more without a pilot and complained both times that he was not qualified.

Plaintiff suffered great stress on these trips and went to a doctor who told him not to return to work. On March 14, 1988 on the advise of doctors he went back to work, but because of stress he could not even work on a train at his old job as a brakeman.

Plaintiff filed a complaint alleging that he suffered injury because of the railroad did not provide him with a safe workplace. The unsafe workplace was being assigned as a conductor on a freight train when he was not qualified.

Rule 56 of the Federal Rules of Civil Procedure mandates that summary judgment shall be entered in favor of a moving party where it appears "that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." The standard for granting summary judgment "mirrors the standard for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986).

In response to a motion for summary judgment, the non-moving party must make a sufficient showing to establish a genuine issue of fact on those elements with respect to which it has the burden of proof. *Celotex Corp v. Catrett, id.* at 323. A summary judgment motion "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. Of course, "(c)redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby*, 477 U.S. at 255.

The Court of Appeals for the Third Circuit has not addressed the question of whether or not a plaintiff can recover under the FELA for purely emotional injuries resulting from stress on the job. Other cases on this topic are instructive, however.

In *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 570 (1987) the Supreme Court addressed the question but did not decide under what circumstances emotional distress is a cognizable injury under the FELA.

> The question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from the common law developments, whether one can recover for emotional injury might rest on a

> variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. For example, while most States now recognize a tort of intentional infliction of emotional distress, they vary in the degree of intent required to establish liability, and the level of physical manifestation of the emotional injury required to support recovery. Moreover, some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace. In addition, although many states have now recognized a tort of negligent infliction of emotional distress, they too vary in the in the degree of objective symptomatology the victim must demonstrate. These issues are only exemplary of the doctrinal divergences in this area. In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no' answer. As in other areas of the law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Id. at 568-70.

In *Hammond v. Terminal R.R. Assoc. of St Louis*, 848 F. 2d 95 (7th Cir. 1988) the complaint "charged the railroad with unfairly criticizing the plaintiff's work, prosecuting unwarranted disciplinary charges against him, setting unrealistic work quotas and 'wearing him out physically and mentally thereby,' harassing him by 'keeping an extraordinarily close watch on (his) work and following him from work assignment to work assignment,' conducting disciplinary proceedings against him unfairly . . . and, by these tactic deliberately inflicting emotional distress on him." *Id.* at 96. The Seventh Circuit held that these injuries were not cognizable under the FELA.

In *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 813 (7th Cir. 1985) the Court of Appeals held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact."

In *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D. Pa. 1989) Judge McGlynn had a case in which a group of Conrail dispatchers claimed that they had physical as well as emotional disorders resulting from working in a high stress environment resulting from management changes in the way they worked. He held that even though the plaintiffs claimed that their emotional injuries resulted in physical symptoms, the plaintiffs could not recover for their injuries under the FELA. *Id.* at 1090. In his opinion Judge McGlynn stated:

Recovery for negligent infliction of emotional distress in this case should be limited for the reasons so often outlined by other courts – namely, a fear of (1) incalculable and potentially unlimited damages, (2) a flood of litigation brought by disenchanted workers, and (3) fraud. These, at least, are the explicit reasons given by courts who might also sense – but cannot explicitly acknowledge – some problem with causation or foreseeability or, perhaps, some feeling that the plaintiff "assumed the risk" of contracting stress-related illnesses by voluntarily accepting stressful positions. Generally, these articulated and unarticulated views are reactions to the application of the "thin skull rule" to claims where the offensive element is not a physical touching of plaintiff, nor the sight of injury or illness to another, but as Judge Posner wisely wrote, "too much – not too dangerous – work. *Lancaster*, 773 F.2d at 813.

id.

There are cases, however, that do allow recovery for emotional injury without the plaintiff experiencing a physical trauma or witnessing one, for example, *Yawn v.*

Southern Ry., 591 F.2d 312 (5th Cir. 1979) and *Barker v. Consolidated Rail Corp.*, No. 85-5304 (E.D. Pa. Jan. 24, 1986).

In the plaintiff's brief it is argued that the cause of the plaintiff's stress was the fact that he was almost involved in some kind of accident during one of the trips that he made without a pilot. I do not find that supported by the depositions or affidavits filed in this case. When asked as to what scared him on the trips in his deposition the plaintiff stated:

I was afraid that during the course of those times that I worked at P.R. 32 that if we were to have an accident of any type that I would be held responsible. Plaintiff's deposition at 73.

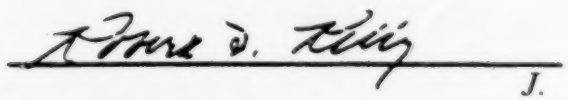
If it is plaintiff's contention that it was fear of imminent impact that was the cause of his claimed injuries then it was plaintiff's obligation to get that onto the record in a form that is cognizable by a court that is deciding a motion for summary judgment, merely claiming it in his brief is not enough. *Celotex v. Catrett, supra, Anderson v. Liberty Lobby, supra.*

Plaintiff argues that the claimed physical manifestations of his injuries, heart palpitations and rectal discharge, allows the railroad to be held responsible for the infliction of emotional distress. However, I hold that these physical manifestations are not sufficient in themselves to allow a railroad to be held liable for the infliction of emotional distress. *Krauss, supra.* I also note that I could not discover in the record a specific finding by an expert that any heart palpitations that the plaintiff experienced had as their cause the stress induced by the incident in this case.

A fair reading of the evidence in this case taking all inferences in favor of the plaintiff and resolving all questions of credibility in his favor indicates that: 1) the plaintiff thought he was unqualified for the job he was doing; 2) he had a very responsible and important job; 3) he never did undergo a test to see if he was familiar with

the physical characteristics of the railroad; 4) failure of the conductor to do his job properly could cause a serious accident; and 5) these facts made the plaintiff deeply afraid. This is insufficient to support a claim under the FELA. It was for these reasons that I entered summary judgment for the defendant.

BY THE COURT:



J.

Robert F. Kelly

No. 90-1060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT A. HOLLIDAY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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January 25, 1991

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Employers' Liability Act ("F.E.L.A.") recognize a cause of action for stress arising from the requirement that one learn and qualify for a new job?
2. May a cause of action be maintained for negligent infliction of emotional distress when there has been no accident or injury to the petitioner or anyone else?

PARTIES TO THE PROCEEDING

Petitioner, Robert A. Holliday, was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent, Consolidated Rail Corporation, was the defendant in the District Court and the appellee in the Court of Appeals.

Respondent has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron and Barberton Belt Railroad Company

Albany Port Railroad Company

The Belt Railway Company of Chicago

Calumet Western Railway Company

Chicago and Western Indiana Railroad Company

Indiana Harbor Belt Railroad Company

The Lakefront Dock and Railroad Terminal Company

Nicholas, Fayette and Greenbrier Railroad Company

Peoria and Pekin Union Railway Company

Pittsburgh, Chartiers and Youghiogheny Railway Company

Railroad Association Insurance, Limited

Trailer Train Company

Transportation Data Exchange, Incorporated

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No. 90-1060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT A. HOLLIDAY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Consolidated Rail Corporation, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on September 14, 1990.

COUNTERSTATEMENT OF THE CASE

Robert A. Holliday ("Holliday") was hired by Consolidated Rail Corporation ("Conrail") in 1979, to work as a brakeman in the Allentown, Pennsylvania area. Within a year, he was promoted to the position of yard conductor. In 1980, Holliday

was furloughed. He was not recalled to work by Conrail until 1986, when he was assigned to Conrail's Oak Island facility in the New Jersey Division and worked from a combined conductor and brakeman list.

Conductors and brakemen are both trainmen who perform such tasks as coupling and uncoupling railroad cars, throwing track switches, watching for signals and observing conditions at railroad grade crossings. The conductor is in charge of the train and is responsible for the satisfactory completion of the assigned tasks of the crew. To become a conductor, an employee, after satisfactory performance as a brakeman, must acquire and demonstrate familiarity with the physical characteristics of the railroad, including the location of the tracks, signals, switches and sidings. Also required is knowledge of the operating rules applicable to the portion of the road over which the train will run. To qualify on a particular railroad line, a conductor can ride trains as an observer, work as a brakeman or apprentice under the supervision of an experienced pilot.

On October 14, 1987, a train dispatcher told Holliday that he was being held out of service until he was qualified as a road conductor. Because Holliday already had worked for over a year as a brakeman in this area, all he had to do to qualify as a road conductor was to demonstrate to a rules examiner or road foreman that he was familiar with the physical characteristics of the railroad. Shortly after he was taken out of service, the United Transportation Union arranged with Conrail to give Holliday ten days in which to qualify for the position, beginning on October 28. Between October 28 and 31, Holliday trained for the position under the supervision of a pilot on assignment WJPR32. Holliday worked the same assignment but without a pilot, on November 3, 4, 5 and 9. Nothing unusual occurred during the days that Holliday worked as the road conductor on WPJR32. (Respondent's Appendix at 1b-5b.) Conrail took Holliday out of service on November 10, because he had not gone to a road foreman or rules examiner to be formally qualified within the prescribed ten day limit.

During the time in which he was training as a conductor, Holliday alleges that he suffered from anxiety in the form of

heart palpatations, sleep disorders, spastic colon, tenesmus and involuntary rectal discharge. The source of Holliday's anxiety stemmed from the occasions that he worked on assignment WJPR32 without the guidance of a pilot. Holliday's thoughts were constantly preoccupied with work and what would happen if there were an accident because he feared that he would be held responsible.

On appeal, Holliday raises the claim that he was placed in a "zone of danger" because Conrail sent him out on job assignments that he was unqualified to perform. The only indication that Holliday may have been placed in danger comes from his hand-written notes. He noted in the entry for November 4, 1987, that while working on assignment WJPR32:

> My mind is not on what it should be. I almost got crushed while working on trk. #9 at Bakelite. Pressure was b[u]ilding up on me, at that time[.] I was thro[w]ing wrong switches, and I should have known better.

However, when Holliday was questioned specifically about this day, he did not even mention this event, nor did he identify this episode as the cause of his anxiety or stress. (Respondent's Appendix at 1b-6b.)

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition for Writ of Certiorari should be denied because both the District Court and Court of Appeals for the Third Circuit properly granted summary judgment on the issue of negligent infliction of emotional distress. After reviewing the facts, these courts applied the appropriate legal standards. Contrary to the assertions of Petitioner, there is no conflict among the courts as to what constitutes negligent infliction of emotional distress from being placed within a zone of danger. Moreover, the holding of the Court of Appeals for the Third Circuit is narrow, applying only to the facts of this case. Therefore, there are no special or important reasons for granting certiorari. The Petition seeks only to have the Court review the record previously presented. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

A. Both The District Court And The Court of Appeals Followed Legally Established Guidelines In Assessing This Claim For Emotional Distress Under The F.E.L.A.

The F.E.L.A. is a federal negligence statute which applies to the railroad industry. 45 U.S.C. §§51-60. Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943); *Inman v. Baltimore & O. R.R.*, 361 U.S. 138, 140 (1959). The Court provided guidelines to be followed in dealing with claims for emotional distress under the F.E.L.A. in *Atchison, T. & S.F. Ry. v. Buell,* 480 U.S. 557 (1987). In assessing the viability of claims for emotional distress, the Court stressed the importance of developing a full record on the exact nature of the injury and the character of the tortious activity. *Id.* at 568. Once the record has been developed, the appropriate legal principles based on "common-law concepts for negligence and injury", *Urie v. Thompson*, 337 U.S. 163, 182 (1949), are to be applied to the particular facts at hand. *Atchison, T. & S.F. Ry. v. Buell,* 480 U.S. at 570. This is exactly what the District Court and the Court of Appeals have done in this case. Each court based its opinion on a full and complete record. (Petitioner's Appendix at A7-8, 25.) Accordingly, they were able to make an exacting scrutiny of the facts of the case and apply the appropriate law.

B. It Is The General Consensus Of The Courts That There Can Be No Recovery For Negligent Infliction Of Emotional Distress Without Some Precipitating Physical Injury Or Accident

Courts dealing with the issue of negligent infliction of emotional distress, under the F.E.L.A., have uniformly held that there must be some precipitating physical injury or accident to allow recovery. *See Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd on other grounds,* 782 F.2d 13 (1st Cir. 1986); *Moody v. Maine Central R.R.*, 620 F. Supp. 1472 (D. Me. 1985), *aff'd on other grounds,* 823 F.2d 693 (1st Cir. 1987); *Moody v. Boston & M.*, 1990 WL 8115 (D. Mass.),

aff'd, ____F.2d ____, 1990 WL 192957 (1st Cir. 1990); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990); *Gaston v. Flowers Transp.*, 675 F. Supp. 1036 (E.D. La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989); *Lancaster v. Norfolk & W. R.R.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *Gillman v. Burlington N. R.R.*, 673 F. Supp. 913 (N.D. Ill. 1987), *aff'd*, 878 F.2d 1020 (7th Cir. 1989); *Amendola v. Kansas City S. Ry.*, 699 F. Supp. 1401 (W.D. Mo. 1988).

Petitioner, in a question presented to the Court, states that this case deals with an employee who was not involved in an accident or subject to any impact. (Petitioner's Questions Presented.) When Holliday was specifically asked during his deposition what caused his fear, he responded: "I was afraid that during the course of those times that I worked at PR32 that if *we were* to have an accident of any type that I would be held responsible." (Emphasis added.) (Respondent's Appendix at 5b.) The only contention that the cause of Holliday's fear was imminent impact is the unsubstantiated claim made in his trial and appellate briefs. The Court has held that such unsubstantiated claims are not sufficient to defeat a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The basis of Holliday's claim is distinquishable from *Fletcher v. Union Pac. R.R.*, 467 F. Supp. 61 (D. Neb. 1979), *rev'd in part*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), since it was not the result of being asked to do a job beyond his "physical capacity to perform with reasonable safety." *Id.* at 906. Rather, it was the result of being asked to qualify and work as a conductor, a position that Holliday had previously held in the Allentown Yard.

Because the record in this case is devoid of any accident or injury to Holliday or anyone else, Petitioner cannot sustain a claim for negligent infliction of emotional distress.

C. There Is No Conflict Among The Courts, That Have Addressed The Issue, As To What Constitutes Negligent Infliction Of Emotional Distress From Being Placed In A Zone of Danger

Only 17 states have allowed recovery for claims of negligent infliction of emotional distress as a result of being placed in a "zone of danger." *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. at 1089. Even if credence were given to Petitioner's assertion that he was placed in the zone of danger, he has not met the common law requirements to sustain this cause of action.

The cases that have specifically applied the zone of danger concept to the F.E.L.A. have uniformly adopted the following principles: 1) the individual must have been in a zone of danger (high risk of physical injury from defendant's negligent act); 2) the individual must have felt contemporaneous fear for his safety; and 3) the individual must show some physical injury or illness as a result of his emotional distress. *Gillman v. Burlington N. R.R.*, 878 F.2d at 1024; *Outten v. National R.R. Pass. Corp.*, No. 88-3347, slip op. at 7 (E.D. Pa. June 13, 1990); *See also Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955); *Beanland v. Chicago R. I. & Pac. R.R.*, 345 F. Supp. 220 (W.D. Ma. 1972), *rev'd*, 480 F.2d 109 (8th Cir. 1973); *Gaston v. Flowers Transp., supra.* Both the District Court and Court of Appeals applying these principles held that Holliday failed to meet his burden and granted summary judgment.

The cases cited by Petitioner as conflicting with the holding of the Court of Appeals do not deal with claims for negligent infliction of emotional distress from being placed in a zone of danger. *Taylor* and *Lancaster* are cases involving a supervisor assaulting an employee.[1] *Yawn* dealt with clerical workers who claimed that they were overworked as a result of being understaffed.[2] Finally, *Lewy* involved the claim of an employee

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1. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986); *Lancaster v. Norfolk & W. R.R., supra.*

2. *Yawn v. Southern Ry.*, 591 F.2d 312 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1980).

who was discharged for other reasons after he was injured in a locomotive collision.[3] It is clear that these cases do not deal with the same tortious conduct. Therefore, their legal principles cannot provide guidance in determining the issues presented here.

D. The Case Turns On Its Particular Facts And There Are No Special Or Important Reasons For Granting Certiorari

Petitioner, in essence, is asking the Court to review the factual conclusions of the lower courts and to analyze their propriety. Both courts stated that their opinions were narrow and turned on the facts presented. As the Court has consistently held, it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). The decision in this case is of importance solely to the litigants. There are no special or important reasons favoring the exercise of the Court's discretionary power of review.

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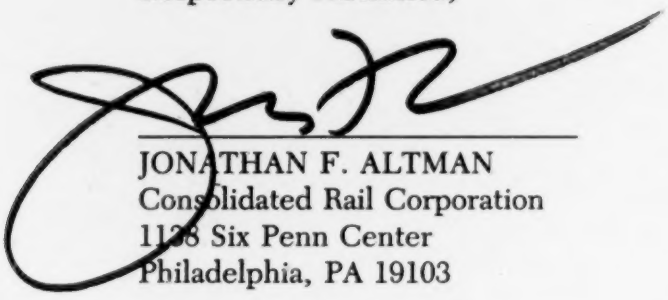
3. *Lewy v. Southern Pac. Transp.*, 799 F.2d 1281 (9th Cir. 1986).

CONCLUSION

For all of the foregoing reasons, Respondent, Consolidated Rail Corporation, respectfully requests that the Petition for Writ of Certiorari of Robert A. Holliday should be denied.

Respectfully submitted,



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January 25, 1991

CERTIFICATION OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioner at the address below by United States mail, first-class postage prepaid, on January 25, 1991, pursuant to Supreme Court Rule of Procedure 29.3:

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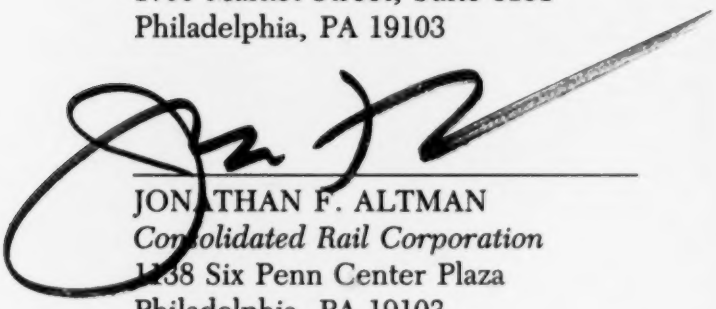

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APPENDIX TO
BRIEF OF RESPONDENT IN OPPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-6437

ROBERT A. HOLLIDAY
vs.
CONSOLIDATED RAIL CORPORATION

Oral deposition of ROBERT A. HOLLIDAY, pursuant to the Federal Rules of Civil Procedure, held in the Legal Department of Consolidated Rail Corporation, 6 Penn Center Plaza, Suite 1138, Philadelphia, Pennsylvania, on Wednesday, December 21, 1988, commencing at 2:45 p.m., before David Lerman, Registered Professional Reporter - Notary Public.

APPEARANCES:

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* * * *

BY MR. SCHWARTZ:

Q. What happened when you were called again for the job, the WJPR 32?

THE WITNESS: What day are we talking about, sir?

MR. SCHWARTZ: The 3rd, that was the next time you were called.

A. On November the 3rd, called again for the WJPR 32. When I got to Port Reading I was told I had no pilot. The yardmaster had a message for me to call a Mr. Hoffman.

Q. Who was Mr. Hoffman?

A. I really don't know, sir. He didn't say. He said, "Call Mr. Hoffman."

I called, but he was in a meeting and after about a half an hour we were waiting around the yardmaster's office there, in the office, and Mr. Kuiper had called me to tell me not to worry about conducting the job, that the customers had to be serviced and he would take responsibility if we went on the ground.

Q. What does that mean?

A. If the train went on the ground.

Q. Derailed?

A. Derailed for some unknown reason, if we went on the ground, and that the engineer was qualified for all of the crossings.

At that point I had no choice, I could not refuse the job.

Q. Well, couldn't you tell him you were not qualified?

A. I told them and they knew.

Q. Did you consider yourself to be not qualified for, that job?

A. I hadn't worked the job that much to be qualified, no.

Q. How much time would you have had to work it before you would consider yourself qualified?

THE WITNESS: Daylight or night?

MR. SCHWARTZ: Either way, whichever you like.

A. I'm not sure, sir, because I don't really know that whole area. There are a number of industries back there that we never even got to.

Q. Was this a night job?

A. Always.

Q. So after Mr. Kuiper told you not to worry about it you then accepted the assignment?

A. Reluctantly. It was either work or not work.

Q. And you were to serve as the conductor on this job; is that correct?

A. That's correct, sir.

Q. Did you work the job?

A. I did.

Q. Did the train go on the ground?

A. No, sir.

Q. Now, according to your notes here you were called, for the same job again the next day?

A. That's correct.

Q. Did you work it?

A. Yes, I did work it.

Q. And the train did not go on the ground then either, did it?

A. No, sir.

Q. Did you work the job again on the 5th?

A. I believe I did, yes, sir.

Q. So then by that time you had now worked that job four times within approximately one week period?

A. That's correct, sir, at night.

Q. Did you then consider yourself to be qualified on that job?

A. No, sir.

Q. Did you discuss with the crew dispatcher when he called you on the 5th and say, "Hey, what are you guys doing?"

A. I did.

Q. What did he tell you?

A. He told me that was the job I fell in line for.

Q. Is that the phrase that he used, that's the job you fell in line for?

A. Something to that effect, sir.

Q. Were you called again for that job after the 5th?

A. I was called again on the 6th. I called to see what job I would be going out on because I periodically did call to see what was in line.

Q. Did they tell you that's what the job was going to be?

A. They told me the WJPR 32 and they also told me at that time that the engineer and brakeman had marked off. I reminded them again that I was not qualified.

He said he understood and he took me on with Mr. VonHolten.

Q. Well, let me interrupt you for a minute, Mr. Holliday. When you had worked the job the previous four or five days, were you working with the same engineer and brakeman every night?

A. I believe during that period the engineer had taken off one night. I believe.

Q. Was the extra engineer qualified, to your knowledge?

A. Evidently, to my knowledge he was, sure. I believe the regular engineer had taken off, but I'm not really certain on that.

Q. So now on the 6th, when you called the dispatcher you said he put you on with VonHolten. What did VonHolten do or say?

A. I told Mr. VonHolten the same thing.

He told me he would call me back and that was early in the afternoon. That was approximately eleven o'clock in the morning because the job started, I think three or something, and that he would call me back, and he never called me back.

Q. What's the next job that you did work?

A. The BB 91 as a conductor with a pilot.

Q. Is that Bound Brook?

A. Yes, I believe it was, sir.

Q. So that would give you an opportunity to qualify on that one also; is that right?

A. That would give me an opportunity to get over that section of the Railroad, one trip.

Q. Had you ever worked that job or a similar job previously?

A. Possibly a similar. I don't know if it was the exact same job.

Q. And you worked that job with a pilot?

A. With a pilot, yes, sir.

Q. What was the next job you worked after that?

A. PR 32.

Q. When did you work it?

A. 11-9-87.

Q. And you were a conductor on that job again?

A. They called me to conduct, but no pilot.

Q. Did you protest at all?

A. I did.

Q. What were you told?

A. I was told by the crew dispatcher that I was out of service until I qualified over the whole territory.

Q. So when they called you on the 9th to work that job did you say, "I'm not working it"?

A. I never refused a job, sir.

Q. Well, what happened then? They called you on the 9th to work the job. Did you work the job on the 9th?

A. I don't believe I did. I don't recall, sir.

Q. Then according to the entry here, the next day when you marked up you were told you were out of service?

A. I think it was two o'clock in the morning when I went to mark back up, I believe I was coming off another job, I was calling in to mark up and I was told I was out of service again.

Q. Did you ask to speak to Mr. VonHolten?

A. Not at that time, no, not at that time of the morning, no, sir.

Q. Did you make an attempt to speak to him again after that?

A. Not at that time, sir, no.

Q. Mr. Holliday, how did you feel about working this job or these jobs for which you felt unqualified?

A. Extremely uneasy, extremely nervous, not sure of myself on that particular job.

Q. What were you uneasy and nervous about?

A. About not knowing the territory.

Q. Did you work again after being taken out of service?

A. I worked two jobs sometime later, yes.

Q. Do you remember when?

A. I believe it was sometime in April.

Q. Did you work again in 1987?

A. No, sir.

* * * *

Q. What did you express to him as being your problem?

A. Very afraid, scared, nervous, extreme uncertainty.

Q. What were you afraid of, what were you scared of?

A. I was afraid that during the course of those times that I worked at PR 32 that if we were to have an accident of any type that I would be held responsible.

Q. What did Dr. Turoczi suggest as far as treatment was concerned?

THE WITNESS: As far as treatment?

MR. SCHWARTZ: Yes.

A. He prescribed walks, he prescribed trying not to think about the Railroad, relaxation. Mostly, I think, relaxation and try not to think about it, to divert my thoughts to other things.

Q. Did Dr. Turoczi suggest any medication for you?

A. No, sir.

Q. Had Dr. Ellsweig suggested any?

A. Dr. Ellsweig had me on medication.

Q. What kind of medication?

A. I think I was on two or three types, I don't recall the names, Xanax was one, I remember Xanax, that's easy to say. The other ones, sir, I don't recall the names.